NO. 80-1952

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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BARBARA BLUM, as Commissioner of the New York State Department of Social Services; DAVID AXELROD, as Commissioner of the New York State Department of Health,

Petitioners,

-against-

WILLIAM YARETSKY, RALPH CUEVAS and THE GRAY PANTHERS, NEW YORK CHAPTER,

Respondents,

and

MARY FOLEY, RAE WOLPER, ROSE SHULMAN, BESSIE ROSSOF, PAULINE ASHKENAZY, CADIE BIRENZWEIG, MARTHA ZAHL, EDNA KOLMNA, JAMES LUNDY and PHILOMENA LATONA LUNDY, on behalf of themselves and all others similarly situated,

Intervenors-Respondents.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' PETITION FOR A WRIT OF CERTIORARI

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No. 80

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OCTOBER TERM, 1980

BARBARA BLUM, as Commissioner of the New York State Department of Social Services; DAVID AXELROD, as Commissioner of the New York State Department of Health,

Petitioners,

-against-

WILLIAM YARETSKY, RALPH CUEVAS and THE GRAY PANTHERS, NEW YORK CHAPTER,

Respondents,

and

MARY FOLEY, RAE WOLPER, ROSE SHULMAN, BESSIE ROSSOFF, PAULINE ASHKENAZY, SADIE BIRENZWEIG, MARTHA ZAHL, EDNA KOLMAN, JAMES LUNDY and PHILOMENA LATONA LUNDY, on behalf of themselves and all others similarly situated,

Intervenors-Respondents.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The certified plaintiff class in this action consists of "all Medicaid recipients in the State of New York who are residents of skilled nursing facilities or health-related facilities in the State." Partial final judgment of District Court, dated Decmeber 13, 1979. Following the granting of a preliminary injunction and

partial summary judgment for the plaintiffs,* extensive pre-trial discovery and trial preparation by the plaintiffs, and a stipulation between the parties concerning relevant facts and legal issues, the parties entered into a consent agreement which resolved favorably for plaintiffs many of the issues in the suit.** The consent agreement was approved by the District Court as a partial final

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* In an unreported decision issued in January, 1978, the District Court initially certified the class and granted a preliminary injunction on several procedural issues concerning a Medicaid patients right (a) to receive timely and adequate written notice, with a detailed statement of reasons, from the State or local Department of Social Services following an adverse Utilization Review Committee (URC) determination that the patient no longer needed his current level of care and should be transferred or discharged out of the facility, and (b) to have full and unencumbered access to all documents and medical information, including so-called "medically contraindicated" information, prior to the "fair hearing" to review the adverse URC determination. That preliminary injunction, insofar as appealed from, was affirmed by the Second Circuit Court of Appeals. 592 F.2d 65 (1979). Partial summary judgment was also granted to plaintiffs with respect to certain rule-making requirements of the New York State Administrative Procedure Act. 456 F.Supp. 653 (1978).

** The consent agreement prohibits the approval or implementation of an adverse URC determination without receipt and consideration by the UR Committee of a written psycho-social evaluation, the attending physician's written statement describing the advisability of the proposed transfer and the patient's likely reaction to it, and a written discharge plan identifying the proposed new placement in sufficient detail to meet the particular needs of the patient. An adverse URC determination cannot be approved or implemented if there is any internal inconsistency, error, or uncorrected procedural or technical irregularity in the assessment instrument or other document forming a basis for the determination. Further, an adverse UR determination cannot be approved or implemented unless it is found to be medically safe and appropriate and in the best interests of the patient, and unless the patient has voluntarily and knowingly consented in writing to the transfer out of his facility. The consent judgment also confirms the patient's procedural rights in connection with the rendering of an adverse URC determination and its review by fair hearing, including the procedural rights secured earlier in the litigation on plaintiffs' preliminary injunction motion. Proof of satisfaction of all the above requirements for an adverse URC determination and testimony at the hearing by a health professional with knowledge of the facts and the determination is required as a necessary condition for a fair hearing decision affirming an adverse URC determination.

judgment on October 19, 1979, following written representations from the Regional Office of the Department of Health and Human Services ("HHS") that the defendants' compliance with the terms of the agreement would not result in retroactive termination or reduction of federal financial participation in the State Medicaid Program. As agreed between the parties, the consent judgment also provided that the defendants would be relieved from their obligations under any provision thereof if HHS determined to terminate or reduce federal financial participation in the State Medicaid Program because of defendants' compliance with that provision.

In explaining their willingness to enter into the consent agreement, the defendants, through their attorney, stated to the Court as follows:

> Defendants agreed to the inclusion of the provision regarding the necessity of patient consent to transfer for two reasons. First, there exists a widespread phenomena known as "transfer trauma" which is the anxiety experienced by an elderly patient when moved from or even faced with the threat of being moved from a nursing home which he has come to view as his home to another institution. Further, it appears that transfer trauma can cause a deterioration of the patient's health leading in some cases to his death. Secondly, it appears that there is at present no way to know which patients who object to being transferred out of a facility will suffer from transfer trauma and which will not.
>
> Therefore, the State defendants concluded that, given the current state of medical understanding of transfer trauma, the only way to protect the patient's health is to require that he consent to any proposed out-of-facility transfer.

Affidavit of Assistant Attorney General Kenneth A. Thomas, sworn to September 19, 1979.

By the time the parties were close to accord on the submission to the District Court of the consent agreement, several cases had been brought to the attention of plaintiffs' attorneys in which members of the plaintiff class had been threatened by their facilities, outside of the utilization review (UR) process, with involuntary transfer or discharge or with denial of readmission following temporary hospital stays. Plaintiffs also anticipated a significant increase in the number of facility-initiated transfers once the UR route to the expulsion of troublesome or undesireable patients was effectively closed by the consent agreement.

In the joint pre-trial order prepared by the parties and approved by the District Court in March, 1979, the parties stipulated to the defendants' policies and practices concerning facility-initiated actions to discharge a patient or transfer him to a lower level of care, without a URC determination, or to transfer a patient to a higher level of care, with or without a URC determination. Defendants stipulated (¶60) that a patient had no right to prior notice and hearing in the case of a facility-initiated discharge or transfer to a lower level of care, but that if the patient requested a URC determination and was able to obtain it, he was entitled to prior notice and fair hearing review of that determination. Defendants further stated that they were considering stopping URC determinations in that context. No notice was to be afforded to patients subjected to such facility-initiated transfers that URC determinations were available, and no indication was given that the patient who knew enough to request a URC determination would necessarily get one or that, if provided, it would supersede the facility decision.

Defendants also stipulated (¶'s 57, 59(c)) that a patient had no right to prior notice and hearing in the case of a facility-initiated transfer to a higher level of care, and that if a URC determination were obtained by the patient upon request (a policy also under reconsideration) the patient had no right to a fair hearing to review that determination. Defendants stated (¶56) that a URC determination that the patient should receive a higher level of care was "advisory" only, and that the patient's refusal to comply would not result in termination of his Medicaid payments. However, no notice of the "advisory" nature of such a URC determination was to be afforded the patient, and in a policy memorandum issued in June, 1978 (78 ADM-31, Addendum page 1) the defendants stated that in such a case the transfer to a higher level of care should be "arranged" by the facility "as soon as possible." Defendants further stipulated (¶58) that it was their practice prior to July, 1978 to afford fair hearing review of adverse UR determinations recommending transfer to a higher level of care, that approximately 10 hearings were held on such transfer decisions with approximately 5 reversals on the merits, and that from July-September, 1978 defendants inadvertently rendered a few hearing decisions on the merits of such transfer decisions.

Finally, defendants stipulated in the pre-trial order (pp.17,23) that one of the issues for trial in this case was whether plaintiffs had a right under federal or state law or the Constitution to an evidentiary hearing prior to a facility-initiated discharge or transfer to a lower level of care, without a URC determination, or to a higher level of care, with or without a URC determination. Subsequently, when the consent agreement was submitted for the District Court's approval, defendants specifically stipulated to the reservation for determination by the District Court of "[t]he question of whether there is state action and a constitutional right to a pre-transfer evidentiary hearing in a patient

transfer to a higher level of care and/or a patient transfer initiated by the facility or its agents."*

Following briefing and argument by the parties on the issue, the District Court ruled that state action is involved in a facility-initiated discharge of a Medicaid patient or his transfer to a lower level of care, done without a UR determination, and in a facility-initiated transfer of a patient to a higher level of care, done with or without a UR determination, and concluded therefore that due process required that the defendants provide advance notice and the opportunity for a hearing to a patient threatened with such a discharge or transfer. That ruling was embodied in a partial final judgment requiring the defendants, in cases of proposed facility-initiated transfers or discharges, to provide affected patients with prior notice and the opportunity for an evidentiary hearing at which they can contest the validity and appropriateness of the proposed action under federal and state regulations which permit facility-initiated transfers or discharges only for medical reasons, the welfare of the patient or other residents, or non-payment for his stay. (42 C.F.R. §§405.1121(K)(4), 442.311(C); 10 N.Y.C.R.R. §414.14(a)(4)).

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* Also reserved for judicial determination was the question of whether federal or state law or the Constitution required the State Commissioner of Social Services to read and consider a verbatim transcript of the fair hearing before rendering a decision adverse to a Medicaid nursing patient. The Second Circuit reversed the District Court's decision favorable to the plaintiffs on that issue. 629 F.2d 817 (1981). The plaintiffs' petition for a writ of certiorari to review that decision was denied by this Court on February 23, 1981.

Between the time of the District Court's decision and argument in the Second Circuit, plaintiffs' attorneys were informed of several cases in which members of the plaintiff class were threatened with facility-initiated transfers or discharges which were avoided only through the intervention of legal services attorneys or persons associated with the New York City nursing home ombudsman program. In response to questions from the Court, plaintiffs' attorney informed the Second Circuit of these circumstances during oral argument of the appeal.

On appeal, the Second Circuit affirmed the judgment on these issues, with some modification, concluding that the facility-initiated transfers and discharges "involve state action affecting constitutionally protected property and liberty interests." 629 F.2d 817, 820 (1981). The Court found state action to inhere in the State's adjustment of the patient's Medicaid benefits following the facility-initiated discharge or transfer to a lower or higher level of care (either with or without a URC determination), noting that "[t]he state has, in essence, delegated a decision to increase or reduce a public assistance recipient's benefits to a 'private' party." 629 F.2d at 820. The Court indicated that in its state action finding it did not need to rely on plaintiffs' additional arguments concerning "the character of the nursing home industry as a regulated industry, nor on the function of providing health care for the elderly as a non-delegable duty of the state." 629 F.2d at 821.* The Court found that a Medicaid patient has a due process-protected property interest in his current level of Medicaid benefits, the termination or reduction of which accompanies the

* The Second Circuit also did not reach plaintiffs' claim made there and in the District Court that federal and state regulations independently require notice and a hearing in connection with facility-initiated patient transfer and discharge actions.

facility's action to discharge the patient or transfer him to a lower level of care. A due process-protected liberty interest, the Court concluded, inheres in the patient's interest in avoiding the transfer trauma which the record in this case disclosed attends the involuntary transfer of an elderly and infirm nursing patient to a higher or lower level of care. 629 F.2d at 821. Therefore, the Court concluded, the Fourteenth Amendment's Due Process Clause applies and requires adequate notice and the opportunity for an evidentiary hearing before the implementation of the facility action.* The Court, however, modified the injunction below to include a provision requiring it to be vacated if HHS determines that the State's compliance therewith makes the State wholly or partially ineligible for federal Medicaid funds.**

At no point in either the District Court or the Second Circuit did defendants suggest that the issues concerning facility-initiated transfer and discharge were non-justiciable or that patients threatened with such actions could secure the protections of the consent judgment by obtaining URC determinations upon request.

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* The Second Circuit distinguished this Court's decision in O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980), by noting that the Medicaid nursing patients in this case are subjected to "direct" injury and loss of Medicaid benefits as a result of the challenged state-sanctioned action of the facilities, whereas in O'Bannon the injury and loss of benefits were only the "indirect" result of the challenged decertification of the facility.

** In the separate cross-petition for a writ of certiorari accompanying this brief, plaintiffs ask this Court to review the propriety of and reverse that modification of the District Court's injunction if this Court grants the defendants' petition.

Developments subsequent to the decision of the Second Circuit confirm that the issues decided by that court represent a continuing controversy between the parties. On December 31, 1980 defendants' attorney sent to plaintiffs' attorney two letters, dated December 18, 1980, from Richard Ruid, Senior Social Services Program Specialist of the New York State Department of Social Services, directing local Departments of Social Services to afford fair hearing rights to two identified class members--Ewell Perry and Gilberta Kaman--who were threatened with facility-initiated transfers. / See Appendix A. Further, the letters in no way suggested that these patients could secure the benefits of the consent judgment by receiving, on request, URC determinations in their cases. Plaintiffs' attorneys also have received a copy of a letter dated April 27, 1981 from Anthony Maddaloni, Health Program Administrator in the Bureau of Long-Term Care Services of the New York State Department of Health, to a nursing facility administrator which indicates that a patient threatened with a facility-initiated discharge is entitled to a URC determination only if the facility order happens to correspond with the date that the URC is required to review the patient's need for continued stay. See Appendix B.

SUMMARY OF ARGUMENT

The defendants' petition for a writ of certiorari should be denied because, under the decisions of this Court, the District Court and the Second Circuit were clearly correct in their resolution of the issues presented in this case, and because defendants' dramatic inconstancy concerning the justiciability of the case and concerning basic facts about plaintiff class members' rights under the consent judgment in this case make it a particularly inappropriate case for this Court to review.

The state action decisions of this Court plainly support the conclusion of the Second Circuit that state action, for purposes of the Fourteenth Amendment's Due Process Clause, attaches to the action of a nursing facility in discharging a Medicaid patient or transferring him to a lower or higher level of care when the State correspondingly modifies the patient's Medicaid benefits on the basis of the facility action. That state action finding as well inheres in (a) the extensive governmental funding, regulation, and control of nursing facilities, including the federal and state regulations which specifically limit facility-initiated transfers to particular stated grounds; and (b) the nursing facility's exercise, as an agent of the State, of the inherently public or governmental function in New York State of providing care for old, infirm, and indigent adults who are eligible for Medicaid benefits. Finally, applicable federal and state regulations independently require notice and hearing in connection with facility-initiated discharges and transfers.

The Second Circuit's finding that Medicaid patients have due process-protected property and liberty interests in avoiding facility discharges and transfers to lower or higher levels of care is also firmly supported by this Court's decisions. As the Second Circuit found, the State's termination or reduction of a patient's Medicaid benefits when the facility discharges the patient or transfers him to a lower level of care implicates protected property interests. Also, Medicaid patients who are discharged or transferred to lower or higher levels of care by a facility have protected property and liberty interests rooted in federal and state regulations which specifically prohibit all such actions except "for medical reasons, or for his welfare or that of other patients, or for nonpayment for his stay."

Thus, the only possibly controversial aspect of the Second Circuit's rulings in this case--that a patient's interest in avoiding the transfer trauma that is triggered by an involuntary facility discharge or transfer is a liberty interest protected by the Due Process Clause--is wholly unnecessary to the conclusion that both state action and due process-protected property and liberty interests are involved in facility discharges and transfers to both lower and higher levels of care. Nonetheless, the Second Circuit correctly found on this record that such transfer trauma--the existence, severity, and unpredictability of which the defendants had expressly conceded below--is entitled to constitutional protection.

Finally, the dramatic shifts in defendants' position that are reflected in their petition to this Court make this a particularly inappropriate case for certiorari review. Defendants expressly stipulated to the adjudication by the District Court of the issues presented here and at no time in either the District Court or the Second Circuit made the suggestion, that they assert for the first time here, that there was no justiciable controversy between the parties. Also defendants now suggest for the first time that plaintiff class members can avoid facility-initiated discharges or transfers by securing URC determinations automatically upon request and thereby obtaining the protections of the consent judgment in this case. These half-hearted attempts by defendants to disavow in this Court the admissions and concessions that they made consistently throughout this litigation in the courts below underscore the inappropriateness of certiorari review in this case.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE (A) THE SECOND CIRCUIT CORRECTLY CONCLUDED THAT THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE REQUIRES NOTICE AND THE OPPORTUNITY FOR AN EVIDENTIARY HEARING BEFORE NURSING FACILITIES CAN TRANSFER OR DISCHARGE MEDICAID PATIENTS, AND (B) DEFENDANTS' AMBIVALENCE CONCERNING THE JUSTICIABILITY OF THE CASE AND PLAINTIFFS' ABILITY TO AVOID ADVERSE FACILITY ACTION MAKES THIS AN ESPECIALLY INAPPROPRIATE CASE FOR CERTIORARI REVIEW.

Plaintiffs respectfully submit that this Court should deny the petition for a writ of certiorari in this case because the Second Circuit's findings of state action and due process-protected property and liberty interests in facility discharges and transfers are plainly consistent with this Court's prior decisions.* Further, defendants' arguments, made here here for the first time, that there was no justiciable

* Plaintiffs argued in both the District Court and the Court of Appeals, and continue to assert in this Court, that applicable federal and state regulations independently require notice and hearing in connection with facility-initiated discharges and tranfers. When a facility initiates a Medicaid patient's discharge or transfer to a lower level of nursing care and the State Department of Social Services correspondingly terminates or reduces the patient's Medicaid benefits, applicable federal and state regulations plainly require that the State provide the patient with prior notice and the opportunity for an agency hearing. 42 C.F.R. §431.220(a)(2) mandates that the State "must grant an opportunity for a hearing to. . .[a]ny recipient who requests it [after appropriate notice] because he believes the agency has taken an action erroneously." "Action," in turn, is defined as a "termination, suspension or reduction of Medicaid eligibility or covered services." 42 C.F.R. §431.201. Accord, O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 65 L.Ed. 2d 506, 515n. 10, 519 n. 19 (1980). The defendants are obligated to comply with, and may not delegate to a private entity, these notice and hearing requirements of the federal regulations, as a necessary condition to participation in the Medicaid program. Cf. Yaretsky v. Blum, 592 F.2d 65, 67 (2d Cir. 1979). The principle that the State agency is required to provide a hearing for a Medicaid patient whose benefits the State terminates or reduces because of the decision of a nominally private doctor is

Ftnote cont.

controversy between the parties and that patients can avoid the facility action by triggering the patient protections of the consent judgment in this case are plainly wrong and place this case in such a confusing posture as to make it inappropriate for certiorari review.*

Ftnote cont.

hardly novel. Thus, 42 C.F.R. §431.213(f) and 18 N.Y.C.R.R. §358.8 require an agency hearing in cases where a "change in the level of medical care is prescribed by the recipient's physician."

Regulations of the State Departments of Social Services and Health equally require agency notice and the opportunity for a hearing in connection with a facility-initiated discharge or transfer which triggers a corresponding termination or reduction of the patient's Medicaid benefits. 18 N.Y.C.R.R. §358.4(a)(4) and (6) entitle a Medicaid recipient to a hearing on the grounds of "discontinuance or suspension of assistance, in whole or in part" and on "any other grounds affecting the. . .recipient's entitlement to assistance or the amount thereof." Cf. 18 N.Y.C.R.R §358.8(d)(1)(viii) (right to State fair hearing when change in level of medical care is prescribed by recipient's physician.) 10 N.Y.C.R.R. §730.17(c) provides for the patient's "right to appeal a negative. . . continued stay review decision." The New York Court of Appeals has confirmed the right of Medicaid patients under state regulations to obtain a State fair hearing where the effect of non-State action is to require the transfer of the patients out of their nursing facilities and to terminate or reduce their benefits. Kane v. Perry, 41 N.Y.2d 1051 (1977), reversing on opinion at Special Term (82 Misc. 2d 1019) and dissenting opinion at Appellate Division (55 Ad2d 678).

* There is no merit to defendants' assertion that this case does not present a justiciable controversy, assertedly because no identified class member was subjected to or threatened with a facility-initiated transfer or because an affected patient might obtain a URC determination and thereby secure the benefits of the consent judgment. As indicated earlier in this brief, at page 4, plaintiffs attorneys knew by the time the consent agreement was approved of the cases of several class members who had been threatened with facility-initiated transfers or discharges. Further, defendants stipulated in the pre-trial order to their policies and practices concerning facility-initiated transfers and discharges and agreed to the trial of the issue of the legality of such actions without prior notice and an opportunity for a

Ftnote cont.

fnote cont.

hearing. These stipulations contained an implicit concession that such facility-initiated actions were occurring and an explicit admission that facility-initiated transfers to higher levels of care, accompanied by URC determinations, were in fact occurring. In the consent agreement itself defendants expressly stipulated that the District Court should adjudicate the issue of the notice and hearing requirements in connection with facility-initiated transfers and discharges. Defendants made no argument in either the District Court or the Second Circuit that this issue was non-justiciable. Since the time of the District Court's decision, plaintiffs' attorneys were made aware of several additional cases of facility decisions to transfer or dicharge plaintiff class members, including two cases specifically identified in letters written by one of defendants' employees.

Defendants never suggested in the District Court or the Second Circuit, or in any of their official policy memoranda issued in connection with this case, that patients threatened with facility-initiated transfers or discharges could secure the protections of the consent judgment by obtaining URC determinations upon request. Further, very recent correspondence from one of defendants' employees confirms that URC determinations are not routinely available to patients threatened with facility-initiated discharges or transfers.

Under these circumstances it is plain that there was and remains a justiciable controversy between the parties on these issues. Cf. Vitek v. Jones, 445 U.S. 480, 485-7 (1980). It is utterly disingenuous and unavailing for defendants to suggest for the first time in this Court, in light of the stipulations and concessions made below, that this case is moot.

A. State Action

In the District Court and the Second Circuit, plaintiffs argued that the state action requirement of the Fourteenth Amendment's Due Process Clause was satisfied under several state action tests approved by this Court, whether considered separately or in the aggregate: (1) under the "nexus" test, since the State encourages, adopts, and acts upon the facility's decision to transfer or discharge the patient, by adjusting the patient's Medicaid benefits accordingly; (2) under the "symbiotic relationship" test, since the interests of the State and the facilities are so interwined by way of governmental regulation, funding, and control that the State must be recognized as a "joint participant" in the facility action; and (3) under the "public function" doctrine, since the rendering of decisions upon which the adjustment of public assistance benefits is based and the provision of institutional care for aged, infirm and indigent adults are functions which are traditionally the ultimate responsibility of government.

1. State Adjustment of Medicaid Benefits and Governmental obligation to Make Medicaid Decisions

Probably the most compelling evidence of state action, and the basis for the Second Circuit's state action finding here, is the fact that the State Department of Social Services terminates, reduces, or increases the patient's Medicaid benefits on the basis of the facility's discharge, transfer to a lower level of care, or transfer to a higher level of care of the patient. Thus the State is not merely aiding, encouraging, and connoting approval of the nominally private facility transfer or discharge decision; beyond that, the State is adopting that decision as the basis for the purely governmental action of adjusting the patient's Medi-

caid benefits. This is state action, not inaction, concerning the very activity about which the plaintiff patients are complaining. Accord, Roberson v. Wood, 464 F.Supp. 983 (E.D.Ill. 1979). Cf. Public Utilities Commission v. Pollack, 343 U.S. 451 (1952). Thus, as the Second Circuit observed, this case is sharply distinguished from the cases relied on by defendants, where what was objected to was the State's failure to act and its mere acquescence in the activities of the private entity. Contrast Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (no state action in passive inaction of Pennsylvania Public Service Commission in simply failing to reject the termination clause of the utility tariff); Schlein v. Milford Hospital, Inc., 561 F.2d 427 (2d Cir. 1977)(no State participation in Hospital's denial of staff privileges to doctor); Barrett v. United Hospital, 376 F.Supp. 791 (S.D.N.Y. 1974), aff'd mem., 506 F.2d 1395 (2d Cir. 1974)(no State participation in Hospital's denial of staff privileges). The State's adjustment of the patient's Medicaid benefits on the basis of the facility's transfer or discharge decision makes for a strong nexus and joint partnership arrangement between the action of the State and that of the facility.* Cf. Adickes v. Kress & Co., 398 U.S. 144 (1970); Dennis v. Sparks, ___ U.S. ____, 66 L.Ed.2d 185 (1980).

It is difficult to imagine a more clearly public and governmental function than responsibility for the decision upon which the adjustment of public assistance benefits is based. The government's responsibility for the reduction

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* The defendants' disingenuous characterization of these facility actions as "medical" decisions is belied by the fact that they are equally likely to represent the facility director's distinctly non-medical determination to rid himself of a patient who is too troublesome or costly to keep and whom he seeks to replace with a more cooperative, private-paying patient.

or termination of governmental public assistance benefits involves discretionary and policy-making judgments which are inherently governmental and non-delegable to a private party. However, even if, as asserted by defendants, that function did involve mere ministerial action, such "overt official involvement" in the otherwise nominally private facility transfer or discharge action would supply the necessary state action. Flagg Brothers v. Brooks, 436 U.S. 149, 157 (1978). Thus, this Court has repeatedly found that the automatic ministerial acts of court clerks in issuing attachment or replevin orders are sufficient to confer state action on otherwise purely private activities. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

Federal and state statutory and regulatory provisions buttress the conclusion that the function of rendering final decisions upon which the adjustment of the patient's Medicaid benefits is based is an exclusively government function. 42 U.S.C. §1396a(a)(5) requires the state or local government agency to make determinations of Medicaid eligibility. Federal regulations generally forbid delegation of responsibilities lodged with the State Medicaid agency, 42 C.F.R. §431.10(e), and specifically require that the state or local agency make Medicaid eligibility decisions. 42 C.F.R. §§431.10(c) and 431.11(d). Cf. Yaretsky v. Blum, 592 F.2d 65, 67 (2 Cir. 1979). State statutory and regulatory requirements equally mandate that the government ultimately be responsible for the correctness of level of care decisions upon which the adjustment of Medicaid benefits is contingent. 18 NYCRR §505.9(b)(1) and (2) require the prior approval of the defendant Commissioner of Health for all admissions to skilled nursing and health-related facilities, including those resulting from transfers, based on a "properly completed and scored" long-term care placement form. New York Public Health Law

§2803(1)(d) requires the defendant State Commissioner of Health or his designee to "determine the necessity and appropriateness of care and services" provided Medicaid patients by hospitals, defined to include nursing facilities (§2801(1)). Under §2803(1)(d) the State Department of Social Services is not authorized to make Medicaid payments for care and services unless the Department of Health certifies them to be appropriate to the patients' needs. 18 NYCRR §§358.9(a) and (b) require the local social services official to review any proposed action to modify benefits "to determine its correctness" before sending notice of proposed agency action.

Additional governmental involvement in a facility's decision to transfer a Medicaid patient to a higher level of care occurs when there is simultaneously a recommendation of the UR Committee that such a transfer be made. Although defendants characterize that UR determination as "advisory" only, there can be no question that the UR determination sanctions and strongly encourages the facility to transfer the patient. Further, the patient is not given notice that the UR determination is "advisory" only and that his Medicaid eligibility will not be jeopardized if he refuses to go. It is disingenuous at best for the defendants to attach significance to the patient's theoretical "choice" to refuse to leave the facility, since in reality the facility can simply evict the patient over his objections,* with a corresponding State adjustment of Medicaid benefits. The action of the UR Committee in recommending the patient's transfer to a higher level of care is clearly governmental action, since federal statute and regulations make it plain that the Committee is acting as an agent of the State in discharging

* In reality, facilities have an even greater incentive to evict patients who, it is claimed, require more care (and are thus more expensive to care for) than those who allegedly require transfer to a lower facility (and are thus cheaper to care for).

its duty to review the medical needs of nursing patients. 42 U.S.C. §§1396(a)(26) (1979 Supp.), 1396a(a)(30), 1396a(a)(31), 1396b(g)(1)(c) and (D). 42 C.F.R. §456.1(a) and (b); 456.301(a), 456.401(a) and (b).

2. State's Obligation to Care for Institutionalized Elderly Persons

It is settled that in New York State the provision of care--including institutionalized care--for old, infirm, and indigent adults who qualify for Medicaid benefits is inherently a public or governmental function. Article 17, §1, of the New York State Constitution states that

> [T]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.

Article 17, §3, of the Constitution provides further that

> [T]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.

The New York Court of Appeals has made clear the fundamental governmental commitment represented by the constitutional provision at Article 17, §1. Since the provision of assistance to the needy is "specifically mandated by our Constitution," it is "not a matter of legislature grace," but rather is a "fundamental part of the social contract" and imposes upon the State an "affirmative duty to aid the needy." Tucker v. Toia, 43 N.Y.2d 1, 7, 8 (1977). Accord, Matter of Lee v. Smith, 43 N.Y.2d 453, 460 (1977). The State Social Services Law (§62 (1), (2) (5)(b), (5)(d)) makes local welfare districts, as agents of the State, responsible for the assistance and care, including nursing care, of any resident who is in need of public assistance and care which he is unable to provide for himself. Under Article 28 of the State Public Health Law, the State acts through licensed and regulated private nursing facilities to directly perform the

governmental function of providing nursing care for the medically needy.

These provisions of New York State law clearly suffice to establish that the responsibility for the well-being of elderly medicaid patients in nursing facitilities is a public or governmental function sufficient to establish state action in the narrow context of the discharge or transfer of those patients from their facilities. Cf. Perez v. Sugarman, 499 F.2d 761 (2 Cir. 1974), state action finding reaffirmed, Duchesne v. Sugarman, 566 F.2d 817, 822 n.4 (2 Cir. 1977)(state action found under the public function, as well as the symbiotic relationship test in the detention of a child by a private child-care agency, in light of the ultimate statutory responsibility of the State for the care and well-being of neglected children, as exercised through the private agencies).

3. Governmental Regulation

The governmental regulation, funding and control of nursing facilities and the medical review and transfer processes are comprehensive. No nursing home can operate in New York State without an operating certificate from the New York State Department of Health. New York Public Health Law, Article 28. The State maintains a strict limit on the number of such operating certificates and the number of beds which may operate in any one community, and it requires aplicants to demonstrate the public need for such beds or facilities. Id., §§2802, 2805. In addition, all nursing homes operate under a pervasive system of Health Department Regulations (10 NYCRR §§414 et seq., 730 et seq, 740 et seq) supplemented by frequent Health Facilities Memoranda and other directives which govern, in minute detail, every aspect of nursing home operations, from the frequency of linen changes to the protection of patient rights (§§414.14, 415.1). The most important of these detailed governmental regulations are the express limitations imposed by federal and state law on

the facility's transfer or discharge of the patient "only for medical reasons, or for his welfare or that of other patients, or for nonpayment for his stay." 42 C.F.R. §§405. 1121(K)(4); 442.311(C); 10 NYCRR §414.14(a)(4). See O'Bannon v. Town Court Nursing Center, supra, 65 L.Ed 2d at 514 n.9,

Moreover, under the Medicaid program, the state contracts with qualified providers for the rendering of services to Medicaid patients and the providers are then reimbursed by the state out of joint federal-state funds. 42 U.S.C. §1396a(a)(13)(E). Determinations of Medicaid eligibility are made by the state or local Department of Services. 42 U.S.C. §1396a(a)(5). The administrative and supervisory functions of the State Department of Social Services are nondelegable. 45 C.F.R. §104.100(b)(1) and (b)(3). The State Department must insure that the medical assistance provided is equal in "amount, duration. . .[and] scope" for all eligible recipients. 42 U.S.C. §1396(10)(B) and (C). The State Department of Social Services must provide for a regular program of medical review and medical evaluation of each Medicaid patient's needs for skilled nursing services. 42 U.S.C. §1396a(a)(26); 42 C.F.R. §456.4. All skilled nursing facilities receiving federal payments under Title XIX must satisfy the extensive requirements of federal law. 42 U.S.C. §§1396a(a)(28); 1395x(j). The Department must provide for utilization review in order to safeguard against inappropriate utilization of care and services. 42 U.S.C. §§1396a(a)(30), 1396b(g)(1)(c), 1396(i)(4). There must be a regular program of medical evaluation of each patient's needs for intermediate care services. 42 U.S.C. §1396a(a)(31); 42 C.F.R. 456.4 The State Department of Health is responsible for assuring the review of the "appropriateness and quality of care and services" furnished to Medicaid recipeints. 42 U.S.C. §1396a(a)(33)(A); 42 C.F.R. §456.6(a).

Skilled nursing facility services are defined and described in the federal statute and regulations. 42 U.S.C. §1396d(f); 42 C.F.R. §§440.40-.140, 442.202, 456.609(a)(2), 405.125-.128a, 405.133, 405.1124(b) and (c), 405.1130, 405.1131. Intermediate care facility services are also defined and described in the federal statute and regulations. 42 U.S.C. §1396d(c), 42 C.F.R. §440.150, 442.251(a)(2), 456.609(a)(2). The obligation of each skilled nursing facility to have an independent utilization review program, the composition of the utilization review committees, and the description of the UR process are set forth in detail in the federal statute and regulations. 42 U.S.C. §§1395x(j), (k); 42 C.F.R. §405.1121(d), 405.1137, 456.501(b), 456.300-.345. The utilization review process for intermediate care facilities is similarly detailed in the federal regulations. 42 C.F.R. §§456.406, 456.436-.438.

Finally, as plaintiffs argued below, what is at stake here is not only the discontinuance of a patient's nursing care accompanied by the State's modification of his Medicaid benefits, but, as well, the eviction of the patient from his home. Cf. O'Bannon v. Town Court Nursing Center, supra,65 L.Ed.2d at 522 (Justice Blackmun, concurring). This eviction is accomplished, as demonstrated above, by a facility which is heavily subsidized, regulated, and controlled by the government and which is subject to federal and state governmental regulations specifically circumscribing the permissible grounds for eviction. This quantum of governmental involvement is at least comparable to that which has persuaded lower courts to find governmental action and due process protections in a low-income tenant's eviction by a private landlord from governmentally subidized §236 housing. Lopez v. Phipps Plaza South, 498 F2d 937 (2 Cir. 1974); Joy v. Daniels, 479 F2d 1236 (4 Cir. 1973).

B. Due Process-Protected Interests

Medicaid nursing patients have both property and liberty interests protected by the Fourteenth Amendment's Due Process Clause in avoiding facility-initiated discharges or transfers to lower or higher levels of care, with corresponding adjustment of their Medicaid benefits. First, the Second Circuit correctly concluded, and it has been settled law since Goldberg v. Kelly, 397 U.S. 254 (1970), that the State's termination or reduction of public assistance Medicaid benefits which accompanies a facility-initiated discharge or transfer to a lower level of care implicates a property interest protected by due process. As this Court observed in O'Bannon v. Town Court Nursing Center, supra, 65 L.Ed.2d at 519, "[t]he Government cannot withdraw these direct benefits without giving the patients notice and an opportunity for a hearing on the issue of their eligibility for benefits." Second, as plaintiffs argued in both the District Court and the Second Circuit, Medicaid patients subjected to facility-initiated discharges or transfers to a lower or higher level of care have due process protected property and liberty interests rooted in both federal and state law not to be discharged or transferred except "for medical reasons, or for his welfare or that of other patients, or for nonpayment for his stay." 42 C.F.R. §§405.112(K)(4), 442.311(C); 10 N.Y.C.R.R. §414.14(a)(4). Accord, O'Bannon v. Town Court Nursing Center, supra, 65 L.Ed 2d at 514 n.9; Brede v. Director for Dept. of Health, 616 F.2d 407, 410-11 (9 Cir. 1980); Roberson v. Wood, 464 F.Supp. 983 (E.D. Ill. 1979). Cf. Vitek v. Jones, 445 U.S. 480 (1980). Additional due process-protected interests in avoiding facility-initiated discharge or transfer to a lower or higher level of care inhere in the patient's right under state law "to refuse medication and treatment after being fully informed of and understanding the consequences of such actions" (N.Y. Public Health Law, §2803-c(3)(e); 10 N.Y.C.R.R. §414.14(a)

(3)), and under federal law in choosing from among qualified providers the particular facility at which to receive medical care and services (42 U.S.C. §1396a(a)(23)). Accord, O'Bannon v. Town Court Nursing Center, supra, 65 L.Ed.2d at 518.

Thus, the findings of the District Court and the Second Circuit that Medicaid patients have due process-protected interests in avoiding facility discharges and transfers to both lower and higher levels of care are sustainable with reference to federal and state positive law sources, without the need to reach the question of whether, on the record in this case, patients have a due process-protected liberty interest in avoiding the "transfer trauma" which accompanies involuntary transfer out of his facility. Nonetheless, plaintiffs submit that the Second Circuit corretly concluded, on this record and in the context of a "decision to transfer a particular patient . . .based on his individual needs" (O'Bannon v. Town Court Nursing Center, supra, 65 L.Ed.2d at 518), that the patient who is involuntarily transferred to a higher level of care is threatened with transfer trauma that implicates a liberty interest protected by the Due Process Clause.

Defendants specifically admitted in the District Court that the transfer trauma experienced by a Medicaid nursing patient who is subjected to or even threatened by involuntary transfer from his facility is a "widespread phenomenon" which is unpredictable in its impact and "can cause a deterioration of the patient's health leading in

some cases to his death." See this brief at page 3, supra.* Further, many of the patients who are discharged or transferred by their facilities end up in adult homes, which, as conceded by defendants, are not medical facilities, are not permitted to provide medical or nursing services, sometimes mix elderly patients with ex-mental patients and alcoholics, and are not equiped to handle a large range of patient impairments and needs. (Joint Pre-Trial Order, ¶8).

The patient's interest in being free of such trauma, deterioration of health, and threat of death accompanying involuntary movement from their facility should enjoy, as the Second Circuit observed, the same due process protection that was accorded in Vitek v. Jones, 445 U.S. 480 (1980), to a prison inmate's interest in avoiding the harm of transfer from a penitentiary to a psychiatric hospital.

* Cf. Burchette v. Dumpson, 387 F.Supp. 812, 819 (E.D.N.Y. 1974) ("The damage which may result from such transfers is irreparable in the true sense of the word. Changes in surroundings and movement of long distances of senior citizens who are suffering from physical and psychological infirmities are likely to aggravate their condition and increase the likelihood of death." As indicated by the administrator of a New York City nursing facility in his deposition in this case, the trauma of being transferred to a higher level of care comes largely from the patient's fear that the move means that he might be dying. Deposition of David Glaser, at pages 47-48.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that defendants' petition for a writ of certiorari be denied.

Dated: New York, New York
June 17, 1981

Respectfully submitted,

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Attorney-in-Charge
The Legal Aid Society
Civil Division

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Attorneys for Plaintiffs-Respondents

RECEIVED
DEC22 1980

December 18, 1980

RECEIVED
DEC22 1980
COUNSEL
N. Y. STATE DEPT OF
SOCIAL SERVICES

Westchester County Department
of Social Services
Nursing Home Unit
150 Grand St.
White Plains, NY 10601

Dear Nursing Home Liason:

We have been informed by the Office of Health Systems Management White Plains regional office that a residential health care facility patient who is a Westchester County Medical Assistance recipient has been recommended for transfer by his attending physician. We are now required to notify this patient of his right to a fair hearing. This letter presents the recommended procedure for fair hearing notification in these instances. The recipient is Ewell Derry, MA D 072435019 at The Ruth Taylor Institute.

The additional fair hearing notification requirement is as a result of the latest court order in the Yaretsky v. Blum case. Medical Assistance recipients in RHCFs who are determined to require a higher or lower level of nursing care regardless of whether the proposed transfer is based on a decision by the utilization review committee, attending physician, or facility medical director are now entitled to a fair hearing. It should be noted that while we are under a court order to implement this procedure, the order is being appealed and finalized procedures in the form of an Administrative Directive will not be issued until the Court of Appeals makes its final determination. While these fair hearings will normally deal only with medicaid level of care determinations which are ultimately the responsibility of the Office of Health Systems Management and not the local Department of Social Services, we are under an obligation to offer the recipient a fair hearing.

Facilities will continue to follow the procedures that are specified in Health Facilities Memorandum 80-27 (4/15/80), and 80-ADM-12 (2/29/80) if the utilization review committee determines (based upon a continued stay review) that a patient/resident requires transfer to a lower level of care. However, all other cases involving proposed transfer to a higher or lower level of care fall under the procedures contained in this letter. This latest court order does not effect direct transfers from residential health care facilities to hospitals.

When the utilization review committee recommends transfer to a higher level of care or when the attending physician or facility medical director recommend transfer to a higher or lower level of care, the residential health care facility must notify the patient/resident, attending physician, next of kin or sponsor and the responsible local department of Social services. This notification will contain the name and address of the attending physician, next of kin or sponsor as well as who made the determination and what the recommendation was.

Upon receipt of the notification that the patient no longer requires his/her present level of care, the responsible social services district shall complete a notification of proposed transfer/discharge and fair hearing rights (a model letter is attached). Copies of this notification shall be sent to the recipient, his/her relative or representative, the facility administrator and the attending physician.

Medical Assistance payments to the facility shall be continued in all instances when the recommendation is for a higher level of care. If the patient chooses to remain at the lower level of care against the recommendation of the utilization review committee, his/her attending physician or facility medical director, he/she will be opting to remain at the less expensive level. There is, therefore, no fiscal incentive to discontinuing payment.

Medical Assistance payments to the facility shall be continued when the recommendation is for a lower level of care until the patient has an opportunity to request a fair hearing and until a fair hearing decision is reached if the patient requests a fair hearing.

Payments must also continue during the period in which the facility is arranging alternate care placement in accordance with departmental regulation 18 NYCRR 505.20.

If you have any questions concerning these interim procedures, please contact me at (518) 474-9176. Thank you for your cooperation.

Sincerely,

DEC 2 2 1980

Richard Ruid
Senior Social Services
Program Specialist

Enclosure
cc: L. Nestle
A. Maddaloni
A. Roberts
L. Glasser
M. Abel
RR:paz

December 18, 1980

Ulster County Department
of Social Services
Nursing Home Unit
Ulster County Office Building
244 Fair Street
Kingston, NY 12401

Dear Nursing Home Liason:

We have been informed by the Office of Health Systems Management White Plains regional office that a residential health care facility patient who is an Ulster County Medical Assistance recipient has been recommended for transfer by her attending physician. We are now required to notify this patient of her right to a fair hearing. This letter presents the recommended procedure for fair hearing notification in these instances. The recipient is Gilberta Kaman, MA 36074 at the Ulster County Infirmary.

The additional fair hearing notification requirement is as a result of the latest court order in the Yaretsky v. Blum case. Medical Assistance recipients in RHCFs who are determined to require a higher or lower level of nursing care regardless of whether the proposed transfer is based on a decision by the utilization review committee, attending physician, or facility medical director are now entitled to a fair hearing. It should be noted that while we are under a court order to implement this procedure, the order is being appealed and finalized procedures in the form of an Administrative Directive will not be issued until the Court of Appeals makes its final determination. While these fair hearings will normally deal only with medicaid level of care determinations which are ultimately the responsibility of the Office of Health Systems Management and not the local Department of Social Services, we are under an obligation to offer the recipient a fair hearing.

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When the utilization review committee recommends transfer to a higher level of care or when the attending physician or facility medical director recommend transfer to a higher or lower level of care, the residential health care facility must notify the patient/resident, attending physician, next of kin or sponsor and the responsible local department of social services. This notification will contain the name and address of the attending physician, next of kin or sponsor as well as who made the determination and what the recommendation was.

Upon receipt of the notification that the patient no longer requires his/her present level of care, the responsible social services district shall complete a notification of proposed transfer/discharge and fair hearing rights (a model letter is attached). Copies of this notification shall be sent to the recipient, his/her relative or representative, the facility administrator and the attending physician.

Medical Assistance payments to the facility shall be continued in all instances when the recommendation is for a higher level of care. If the patient chooses to remain at the lower level of care against the recommendation of the utilization review committee, his/her attending physician or facility medical director, he/she will be opting to remain at the less expensive level. There is, therefore, no fiscal incentive to discontinuing payment.

Medical Assistance payments to the facility shall be continued when the recommendation is for a lower level of care until the patient has an opportunity to request a fair hearing and until a fair hearing decision is reached if the patient requests a fair hearing.

Payments must also continue during the period in which the facility is arranging alternate care placement in accordance with departmental regulation 18 NYCRR 505.20.

If you have any questions concerning these interim procedures, please contact me at (518) 474-9176. Thank you for your cooperation.

Sincerely,

Richard Ruid
Senior Social Services
Program Specialist

Enclosure 1
cc: L. Nestle
A. Maddaloni
A. Roberts
L. Glasser
M. Abel

STATE OF NEW YORK
DEPARTMENT OF HEALTH OFFICE OF HEALTH SYSTEMS MANAGEMENT

TOWER BUILDING ○ THE GOVERNOR NELSON A. ROCKEFELLER EMPIRE STATE PLAZA ALBANY, N.Y. 12237

DAVID AXELROD, M.D.
Commissioner

May 4 10 44 AM '81

April 27, 1981

Paul K. Jensen
Assistant Administrator
Eger Nursing Home
140 Meisner Avenue
Staten Island, New York 10306

Dear Mr. Jensen:

I am in receipt of you April 16, 1981, letter to me concerning proposed discharge of patients by attending physicians.

Your understanding of my previous statements were correct in that attending physician initiated discharges are not constrained by the first partial final judgment in Yaretsky vs. Blum. Where a non-UR related discharge is proposed, the patient does have the right to a fair hearing, but the facility is not required to follow the procedures outlined in Health Facilities Memorandum 80-27. A New York State Department of Health memorandum will be released to address these differences.

In response to your two specific questions, I offer the following:

1. A physician does have the authority to discharge a patient from any health care facility, however, the federal court has ruled that a Medicaid patient may challenge that decision by requesting a fair hearing.

2. A physician's order to discharge a patient does not require notification to the UR Committee unless the patient's continued stay review date corresponds with the physician's order. In this case, all pertinent medical information, including the physician's discharge order, must be available to the UR Committee and any subsequent decision would require compliance with Health Facilities Memorandum 80-27. If the patient is not scheduled for

a continued stay review, and the physician orders discharge, the patient may be discharged unless a fair hearing is requested.

I am sorry if you have had difficulty with the fair hearing process and by copy of this letter I am notifying Mr. Phil Nostramo, New York State Department of Social Services, of this decision for his review.

If you have any further questions or concerns relative to this matter, please feel free to contact me.

Sincerely,

Anthony J. Maddaloni
Health Program Administrator
Bureau of Long Term Care Services

No. 80-1952
80-6890

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BARBARA BLUM, as Commissioner of the New York State Department of Social Services; DAVID AXELROD, as Commissioner of the New York State Department of Health,

Petitioners,

-against-

WILLIAM YARETSKY, RALPH CUEVAS and THE GRAY PANTHERS, NEW YORK CHAPTER

Respondents-Cross-Petitioners,

-and-

MARY FOLEY, RAE WOLPER, ROSE SHULMAN, BESSIE ROSSOFF, PAULINE ASHKENAZY, SADIE BIRENZWEIG, MARTHA ZAHL, EDNA KOLMAN, JAMES LUNDY and PHILOMENA LATONA LUNDY, on behalf of themselves and all others similarly situated,

Intervenors-Respondents-Cross-Petitioners.

MOTION FOR LEAVE TO FILE PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' PETITION FOR CERTIORARI AND PLAINTIFFS' CROSS-PETITION FOR CERTIORARI AND TO PROCEED IN THIS CASE IN FORMA PAUPERIS

Pursuant to Rule 46 of the Rules of this Court, motion is hereby made that plaintiffs be allowed to file their brief in opposition to defendants' petition for certiorari and their cross-petition for certiorari in unprinted form and to proceed in this case in forma pauperis for the reasons stated in the attached affidavits of plaintiffs. Plaintiffs were permitted to proceed in forma pauperis in

both the District Court and the Court of Appeals in this case.

KALMAN FINKEL
Attorney-in-Charge
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Attorneys for Plaintiffs-Respondents-
Cross-Petitioners

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BARBARA BLUM, as Commissioner of the New York State Department of Social Services; DAVID AXELROD, as Commissioner of the New York State Department of Health,

Petitioners,

against

WILLIAM YARETSKY, RALPH CUEVAS, and THE GRAY PANTHERS, NEW YORK CHAPTER,

Respondents-Cross-Petitioners,

and

MARY FOLEY, RAE WOLPER, ROSE SHULMAN, BESSIE ROSSOFF, PAULINE ASHKENAZY, SADIE BIRENZWEIG, MARTHA ZAHL, EDNA KOLMAN, JAMES LUNDY and PHILOMENA LATONA LUNDY, on behalf of themselves and all others similarly situated,

Intervenors-Respondents-Cross-Petitioners.

AFFIDAVIT IN SUPPORT OF MOTION TO FILE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI AND PLAINTIFFS' CROSS-PETITION FOR A WRIT OF CERTIORARI AND TO PROCEED IN THIS COURT IN FORMA PAUPERIS

I, MARY FOLEY, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to file a brief opposing the petition for a writ of certiorari and plaintiffs' cross-petition for a writ of certiorari and to proceed in this court in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition and filing the cross-petition are true.

1. Are your presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

NO

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1970 . About $400 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

None to my knowledge

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

MARY FOLEY

SUBSCRIBED AND SWORN TO before me this 12th day of June, 19 81.

MARTIN C. PRICE
Notary Public, State of New York
No. 31 4525922
Qualified in Kings County
Commission Expires March 30, 19 82

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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Petitioners,

against

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Respondents,

and

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Intervenors-Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO FILE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI AND PLAINTIFFS' CROSS-PETITION FOR A WRIT OF CERTIORARI AND TO PROCEED IN THIS COURT IN FORMA PAUPERIS

I, ROSE SHULMAN, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to file a brief opposing the petition for a writ of certiorari and plaintiffs' cross-petition for a writ of certiorari and to proceed in this court in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition and filing the cross-petition are true.

1. Are your presently employed?

NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Was never employed outside the home

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

NO.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Rose Shulman

ROSE SHULMAN

SUBSCRIBED AND SWORN TO before me this 12th day of June, 19 81.

Martin C. Price

MARTIN C. PRICE
Notary Public, State of New York
No. 31-4525922
Qualified in Kings County
Commission Expires March 30, 19 82

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BARBARA BLUM, as Commissioner of the New York State Department of Social Services; DAVID AXELROD, as Commissioner of the New York State Department of Health,

Petitioners,

against

WILLIAM YARETSKY, RALPH CUEVAS, and THE GRAY PANTHERS, NEW YORK CHAPTER,

Respondents,

and

MARY FOLEY, RAE WOLPER, ROSE SHULMAN, BESSIE ROSSOFF, PAULINE ASHKENAZY, SADIE BIRENZWEIG, MARTHA ZAHL, EDNA KOLMAN, JAMES LUNDY and PHILOMENA LATONA LUNDY, on behalf of themselves and all others similarly situated,

Intervenors-Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO FILE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI AND PLAINTIFFS' CROSS-PETITION FOR A WRIT OF CERTIORARI AND TO PROCEED IN THIS COURT IN FORMA PAUPERIS

I, RAE WOLPER, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to file a brief opposing the petition for a writ of certiorari and plaintiffs' cross-petition for a writ of certiorari and to proceed in this court in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition and filing the cross-petition are true.

1. Are your presently employed?

No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1956 $100 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

NO.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Rae Wolper

RAE WOLPER

SUBSCRIBED AND SWORN TO before me this 12th day of June, 19 81.

Martin C. Price

MARTIN C. PRICE
Notary Public, State of N
No. 31-4525922
Qualified in Kings Co
Commission Expires March 30, 1982

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BARBARA BLUM, as Commissioner of the New York State Department of Social Services; DAVID AXELROD, as Commissioner of the New York State Department of Health,

Petitioners,

against

WILLIAM YARETSKY, RALPH CUEVAS, and THE GRAY PANTHERS, NEW YORK CHAPTER,

Respondents,

and

MARY FOLEY, RAE WOLPER, ROSE SHULMAN, BESSIE ROSSOFF, PAULINE ASHKENAZY, SADIE BIRENZWEIG, MARTHA ZAHL, EDNA KOLMAN, JAMES LUNDY and PHILOMENA LATONA LUNDY, on behalf of themselves and all others similarly situated,

Intervenors-Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO FILE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI AND PLAINTIFFS' CROSS-PETITION FOR A WRIT OF CERTIORARI AND TO PROCEED IN THIS COURT IN FORMA PAUPERIS

I, PAULINE ASHKENAZY, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to file a brief opposing the petition for a writ of certiorari and plaintiffs' cross-petition for a writ of certiorari and to proceed in this court in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition and filing the cross-petition are true.

1. Are your presently employed?

No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1970 $ [illegible]

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Pauline Ashkenazy

PAULINE ASHKENAZY

SUBSCRIBED AND SWORN TO before me this 12th day of June, 19 81.

Martin C. Price

MARTIN C. PRICE
Notary Public, State of New York
No. 31-4525922
Qualified in Kings County
Commission Expires March 30, 19 82

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BARBARA BLUM, as Commissioner of the New York State Department of Social Services; DAVID AXELROD, as Commissioner of the New York State Department of Health,

Petitioners,

against

WILLIAM YARETSKY, RALPH CUEVAS, and THE GRAY PANTHERS, NEW YORK CHAPTER,

Respondents,

and

MARY FOLEY, RAE WOLPER, ROSE SHULMAN, BESSIE POSSOFF, PAULINE ASHKENAZY, SADIE BIRENZWEIG, MARTHA ZAHL, EDNA KOLMAN, JAMES LUNDY and PHILOMENA LATONA LUNDY, on behalf of themselves and all others similarly situated,

Intervenors-Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO FILE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI AND PLAINTIFFS' CROSS-PETITION FOR A WRIT OF CERTIORARI AND TO PROCEED IN THIS COURT IN FORMA PAUPERIS

I, JAMES LUNDY, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to file a brief opposing the petition for a writ of certiorari and plaintiffs' cross-petition for a writ of certiorari and to proceed in this court in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition and filing the cross-petition are true.

1. Are your presently employed?

NO.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1961. About $450 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

No.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

James Lundy

JAMES LUNDY

SUBSCRIBED AND SWORN TO before me this 10th day of June, 1981.

Martin O. Price

MARTIN O. PRICE
Notary Public, State of New York
No. 31-4525922
Qualified in Kings County
Commission Expires March 30, 1982

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BARBARA BLUM, as Commissioner of the New York State Department of Social Services; DAVID AXELROD, as Commissioner of the New York State Department of Health,

Petitioners,

against

WILLIAM YARETSKY, RALPH CUEVAS, and THE GRAY PANTHERS, NEW YORK CHAPTER,

Respondents,

and

MARY FOLEY, RAE WOLPER, ROSE SHULMAN, BESSIE ROSSOFF, PAULINE ASHKENAZY, SADIE BIRENZWEIG, MARTHA ZAHL, EDNA KOLMAN, JAMES LUNDY and PHILOMENA LATONA LUNDY, on behalf of themselves and all others similarly situated,

Intervenors-Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO FILE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI AND PLAINTIFFS' CROSS-PETITION FOR A WRIT OF CERTIORARI AND TO PROCEED IN THIS COURT IN FORMA PAUPERIS

I, PHILOMENA LATONA LUNDY, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to file a brief opposing the petition for a writ of certiorari and plaintiffs' cross-petition for a writ of certiorari and to proceed in this court in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition and filing the cross-petition are true.

1. Are your presently employed?

NO.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1951 Does not remember

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

No.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

NO.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Philomena Latona Lundy
PHILOMENA LATONA LUNDY

SUBSCRIBED AND SWORN TO before me this 12th day of June, 19 81.

Martin L. Price
MARTIN C. PRICE
Notary Public, State of New
No. 31-4525922
Qualified in Kings County
Commission Expires March 30, 1982